1992

The State of Utah v. Jesus A. Sepulveda : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 92-0163-CA

STATE OF UTAH,	:	
Plaintiff-Petitioner,	:	Case No. 920163-CA
v.	:	
JESUS A. SEPULVEDA,	:	Category No. 2
Defendant-Respondent.	:	

PETITION FOR REHEARING

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PETITION FOR REHEARING

STATEMENT OF ISSUES PRESENTED ON PETITION FOR REHEARING

The sole issue presented in this petition for rehearing is whether the Court overlooked relevant law in conducting a sua sponte plain error analysis of an issue that was raised by defendant for the first time on appeal.

STATEMENT OF THE CASE

Defendant, Jesus A. Sepulveda, was charged with possession of a controlled substance (cocaine) with the intent to distribute, a second degree felony, under Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1991) (R. 2). After the trial court denied defendant's motion to suppress evidence, a jury convicted defendant as charged (R. 22, 26-41, 70-74, 131).

The trial court sentenced defendant to a term of one to fifteen years in the Utah State Prison and imposed various fines and fees (R. 150). The court then suspended defendant's sentence and imposed a 36-month term of probation (R. 150-51).

On appeal, this Court affirmed defendant's conviction in an opinion issued October 27, 1992. State v. Sepulveda, 198

Utah Adv. Rep. 69 (Utah App. Oct. 27, 1992) (a copy is attached as an addendum).

STATEMENT OF FACTS

The State does not disagree with the facts stated in the Court's opinion, Sepulveda, 198 Utah Adv. Rep. at 69-70.

SUMMARY OF ARGUMENT

The Court's sua sponte plain error treatment of the scope of detention issue is inconsistent with other decisions of the Court. Furthermore, the Court's inconsistent application of the waiver rule undermines the integrity of appellate review in criminal cases and may have serious consequences for federal habeas review of Utah appellate court decisions.

INTRODUCTION

A petition for rehearing is appropriate when the Court has misapplied the law. See Cummins v. Nielson, 42 Utah 157, 172-73, 129 P. 619, 624 (1913). The argument portion of this brief will demonstrate that the State's petition for rehearing is properly before the Court and should be granted.

ARGUMENT

IN CONDUCTING A SUA SPONTE PLAIN ERROR ANALYSIS OF AN ISSUE RAISED BY DEFENDANT FOR THE FIRST TIME ON APPEAL, THE COURT MISAPPLIED THE LAW OF WAIVER

In addressing defendant's "scope of detention" argument, this Court correctly noted that defendant raised the issue for the first time on appeal and did not urge the Court to apply a plain error analysis, an exception to the waiver rule. Sepulveda, 198 Utah Adv. Rep. at 71, 72 n.4. Nevertheless, the

Court conducted a full-blown plain error analysis. Id. at 72-73. Although the Court purports to "decline to consider the scope of detention issue for the first time on appeal" in light of its conclusion that the trial court did not commit plain error, id. at 73, such an approach misapplies the waiver rule.

It is well settled that Utah appellate courts will not consider an issue, even a constitutional one, for the first time on appeal. State v. Price, 827 P.2d 247, 248 & n.2 (Utah App. 1992); State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1991); State v. Webb, 790 P.2d 65, 77 (Utah App. 1990). The appellate courts recognize two exceptions to that rule: plain error or exceptional circumstances. Archambeau, 820 P.2d at 922. However, the defendant must demonstrate one of the exceptions before the appellate court will look past the waiver and address the merits of the issue raised for the first time on appeal. See Archambeau, 820 P.2d at 925 ("We conclude that a defendant may not assert a constitutional issue for the first time on appeal unless he can demonstrate "plain error" *or* "exceptional circumstances."); Webb, 790 P.2d at 78 (refusing to consider issue raised for first time on appeal because defendant "has not contended that the plain error exception should apply or that any special circumstances justify his failure to present this particular ground for the motion to suppress to the trial court"); State In Interest of M.S., 781 P.2d 1289, 1291 (Utah App. 1989) ("Although reviewing courts will, in the exceptional or extraordinary case, overlook a party's failure to raise

constitutional challenges in the proceedings below, M.S. has not persuaded us of the existence of such exceptional circumstances in this case.").

Here, defendant argued neither plain error nor exceptional circumstances to avoid the obvious waiver on appeal. Nevertheless, the Court addressed the plain error question sua sponte.

In sum, the Court's plain error treatment of the scope of detention issue, in the absence of any plain error argument by defendant, is contrary to the direction in Archambeau, Webb, and M.S. that the defendant must demonstrate an exception to the waiver rule. It therefore represents an inconsistent application of the waiver rule by this Court. This undermines the integrity of the Court's appellate review in criminal cases (i.e., why does Sepulveda get the benefit of sua sponte plain error analysis when Webb did not, Webb, 790 P.2d at 78).

Inconsistent application of the waiver rule also has serious consequences in federal habeas proceedings. In Coleman v. Saffle, 869 F.2d 1377, 1382-83 (10th Cir. 1989), cert. denied, 110 S. Ct. 1835 (1990), the Tenth Circuit Court of Appeals made clear that the procedural default rule of Wainwright v. Sykes, 433 U.S. 72 (1977), which bars federal habeas review when the state courts have declined to review a federal issue due to a procedural default (waiver) by the defendant (e.g., failure to comply with a state contemporaneous objection rule), does not apply when the state waiver rule has not been consistently

applied. In short, inconsistent application of the waiver rule by this Court invites wholesale federal habeas review of this Court's decisions that have disposed of federal questions on the basis of waiver. That sort of pervasive review of state court decisions is clearly undesirable, in that it undermines the state's weighty interest in the finality of criminal judgments. See Boggess v. Morris, 635 P.2d 39, 41 (Utah 1981) (emphasizing that "integrity of the criminal justice system requires a finality of judgment that should limit repetitive appeals and collateral attacks" once the normal appellate process has concluded).

In sum, the Court should eliminate from its opinion the plain error analysis of the scope of detention issue and simply decline to address the issue on the grounds that defendant did not present it to the trial court and on appeal did not argue either the plain error or exceptional circumstance exception to the waiver rule. This would bring the decision in line with Archambeau, Webb, and M.S.

CONCLUSION

Based on the foregoing argument, the Court should grant rehearing and modify its opinion to conform with its own waiver law. Utah R. App. P. 35(c).

The State certifies that this petition is presented in good faith and not for delay.

RESPECTFULLY submitted this 10th day of November, 1992.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Petition for Rehearing were mailed, postage prepaid, to Milton T. Harmon, Attorney for Appellant, 36 South Main Street, P.O. Box 97, Nephi, Utah 84648, this 10th day of November, 1992.

David B. Thompson

ADDENDUM

The Commission found that Johnson suffered incapacity as early as June 26, 1987, and no later than December 1987 because Johnson may have missed work in June or July 1987 and did miss work in December 1987 because of his laryngitis. The record amply supports these findings and Johnson fails to show any flaw in the evidence upon which the Commission relied.[3] Accordingly, because Johnson did not marshal the evidence in support of the Commission's findings and then demonstrate that those findings were unsupported by substantial evidence, we accept the findings of the Commission as conclusive. *Stewart*, 831 P.2d at 138.

Johnson also claims that the Commission applied the incorrect statute of limitations to his action. Because he failed to raise this issue before the ALJ or before the Commission, we will not consider it for the first time on review. *Merriam v. Board of Review*, 812 P.2d 447, 451 (Utah App. 1991); *Rekward v. Industrial Comm'n*, 755 P.2d 166, 168 (Utah App. 1988).

CONCLUSION

We accept the findings of the Commission establishing that Johnson's cause of action arose no later than January 1988, and that Johnson failed to file his claim within the time allowed by Utah Code Ann. §32-2-48 (1988). We do not address Johnson's claim that the Commission applied the improper statute of limitations because he failed to raise it before the Commission.

Accordingly, we affirm.

Norman H. Jackson, Judge

I CONCUR:

Russell W. Bench, Judge

I CONCUR IN RESULT:

Gregory K. Orme, Judge

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1. This review is distinguishable from both a *de novo* review and the "any competent evidence" standard of review. *Grace Drilling*, 776 P.2d at 68.

2. An appellate court need not, and will not, consider any facts not properly cited to or supported by the record. *Uckerman v. Lincoln Nat'l Life Ins. Co.*, 588 P.2d 142, 144 (Utah 1978).

3. Nowhere in the record or in Johnson's brief does Johnson question the definition of the term "incapacity" as used in Utah Code Ann. §35-2-48 (1988). In fact, Johnson consistently equates incapacity with missed work. We assume, but do not decide, that "incapacity" is linked to missed work and we decline to extend our analysis to an independent review of this issue when Johnson has failed to so posture his challenge.

Cite as
198 Utah Adv. Rep. 69

IN THE
UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Appellee,
v.
Jesus A. SEPULVEDA,
Defendant and Appellant.

No. 920163-CA
FILED: October 27, 1992

Fourth District, Juab County
The Honorable George E. Ballif

ATTORNEYS:
Milton T. Harmon, Nephi, for Appellant
R. Paul Van Dam and Marian Decker, Salt Lake City, for Appellee

Before Judges Billings, Greenwood, and Orme.

This opinion is subject to revision before publication in the Pacific Reporter.

BILLINGS, Associate Presiding Judge:

Defendant Jesus A. Sepulveda appeals his jury conviction for possession of a controlled substance with intent to distribute, a second-degree felony, in violation of Utah Code Ann. §58-37-8(1)(a)(ii) (Supp. 1992). We affirm.

FACTS

On January 30, 1990, Officer Paul V. Mangelson stopped a Camaro sports car near Nephi, Utah after observing the car had an expired registration sticker. Defendant, the driver, was traveling in the company of a woman and a juvenile. All were Hispanic. Officer Mangelson observed "[t]he interior was quite cluttered up, and it appeared that they'd been living in the car."

Officer Mangelson asked defendant for his driver's license and registration. Defendant produced an expired California temporary driving permit and had no registration information for the car. Defendant claimed a friend in California loaned him the vehicle for his return trip to Utah when the truck in which he traveled to California broke down.

As the conversation continued, Officer Mangelson observed defendant grow nervous and begin to shake. Officer Mangelson inquired whether defendant was carrying "contraband" in the car, and defendant responded negatively. Next, Officer Mangelson asked to search the vehicle for guns, alcohol, or drugs, and defendant said, "Go ahead." Officer Mangelson requested defendant and the two passengers to exit the car. During a pat-down search, Officer

Mangelson discovered in the juvenile's back pocket a pipe commonly used for smoking marijuana.

Officer Mangelson asked defendant to open the trunk. Defendant stated he had no key to the trunk but broke the lock with a screwdriver so Officer Mangelson could search the trunk. After ascertaining the trunk contained no contraband, Officer Mangelson proceeded to the interior of the car. He observed that the screws on the back of the driver's bucket seat were marred. At some point before Officer Mangelson removed these screws, the woman passenger identified herself to Officer Mangelson as an undercover DEA agent. She told Officer Mangelson she was certain the car contained narcotics but did not know where they were hidden. Officer Mangelson removed the screws on the back of the front seat, revealing a compartment containing cocaine.

Defendant moved to suppress the cocaine on the ground that it was illegally seized. In support of his motion to suppress, defendant argued he never voluntarily consented to the search of the vehicle, and Officer Mangelson had no probable cause to search. The trial court denied defendant's motion. Defendant was convicted by a jury as charged. Despite his arguments below, on appeal defendant additionally claims the trial court erred in denying his motion to suppress because Officer Mangelson unreasonably detained him beyond the scope of the original traffic stop. Defendant also argues he gave no voluntary consent, and there was no probable cause to search the vehicle.

In examining a denial of a motion to suppress, we review the trial court's findings of fact "under a 'clearly erroneous' standard" and the trial court's "ultimate legal conclusions" based on those findings "under a 'correctness' standard." *State v. Lopez*, 831 P.2d 1040, 1043 (Utah App. 1992).

STANDING.

As a threshold issue, the State claims defendant lacks standing to challenge the search of the vehicle. The State argues the trial court actually found defendant had no standing.[1] In any event, we review the trial court's conclusion as to whether defendant had a legitimate expectation of privacy under a correctness standard, affording no deference. *See State v. Taylor*, 818 P.2d 561, 565 (Utah App. 1991).

Fourth Amendment rights are personal in nature and "'may not be vicariously asserted.'" *Rakas v. Illinois*, 439 U.S. 128, 133, 99 S. Ct. 421, 425 (1978) (quoting *Alderman v. United States*, 394 U.S. 165, 174, 89 S. Ct. 961, 966 (1969)); *accord Taylor*, 818 P.2d at 565. Therefore, to challenge the propriety of a search, a defendant must establish "a legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143, 99 S. Ct. at 430; *accord State v. Atwood*, 831 P.2d 1056, 1058 (Utah App. 1992). Furthermore, "[o]nce the defendant has been put on notice that the state claims the warrantless search was constitutional because [the defendant] has no expectation of privacy in the area searched, then the defendant must factually demonstrate . . . standing to contest the warrantless search." *State v. Marshall*, 791 P.2d 880, 887 (Utah App.), *cert. denied*, 800 P.2d 1105 (Utah 1990).

In determining whether a defendant has shown the requisite expectation of privacy in the area searched, we employ a two-step test. First, we examine whether the defendant "has demonstrated 'a subjective expectation of privacy in the object of the challenged search.'" *Taylor*, 818 P.2d at 565 (quoting *United States v. Hastamorir*, 881 F.2d 1551, 1560 (11th Cir. 1989)); *accord State v. Webb*, 790 P.2d 65, 80 (Utah App. 1990). Second, we conclude, as a matter of law, "whether society is 'willing to recognize the individual's expectation of privacy as legitimate.'" *Taylor*, 818 P.2d at 565 (quoting *Hastamorir*, 881 F.2d at 1560); *accord Webb*, 790 P.2d at 80. This test does not provide a "bright line" standard because "no single factor invariably will be determinative" in judging the reasonableness of privacy expectations. *Rakas*, 439 U.S. at 152, 99 S. Ct. at 435 (Powell, J., concurring).

Utah courts have concluded a defendant must have at least permissive, possessory control of the car to contest a warrantless automobile search. *See State v. Constantino*, 732 P.2d 125, 126-27 (Utah 1987) (per curiam); *State v. Robinson*, 797 P.2d 431, 437 n.6 (Utah App. 1990); *State v. DeAlo*, 748 P.2d 194, 200 (Utah App. 1987) (Greenwood, J., concurring and dissenting).

In *Constantino*, police officers stopped the car the defendant was driving because one of the officers knew the defendant's driver's license had been suspended and there was an outstanding warrant for the defendant's passenger. *See Constantino*, 732 P.2d at 125. The officers subsequently confirmed this information through dispatch. *See id.* When the defendant told the officers the registered owner of the car was "a Mr. Groberg," the officers impounded the car until they could find a licensed driver or contact the owner. *Id.* An inventory search of the car revealed two plastic bags of marijuana bearing the defendant's fingerprints. *See id.* at 125-26. The defendant moved to suppress the evidence, arguing lack of probable cause to stop and search the vehicle. *See id.* at 126.

The Utah Supreme Court declined to reach the defendant's arguments concerning the validity of the search, concluding:

> [T]he facts here show no right to possession. [The officer]'s brief investigation of defendant revealed that the car was registered to a person other than defendant. *Defendant presented no testimony that he had driven the car with the permission of the owner or that he had borrowed the car under circumstances that would imply permissive use. Absent claimed*

> *right to possession, he could not assert any expectation of privacy in the items seized and had no standing to object to the search.*

Id. at 126-27 (emphasis added); *accord State v. Larocco*, 742 P.2d 89, 92 (Utah App. 1987) ("We agree with the reasoning in *State v. Constantino*, that there must be at least a claimed right to possession in the property."), *aff'd in part and rev'd in part*, 794 P.2d 460 (Utah 1990).

In *Robinson*, a police officer stopped a van in which the defendants Towers and Robinson were traveling for driving erratically. *See Robinson*, 797 P.2d at 433. Both defendants produced valid California driver's licenses and a registration listing "Paul Jarred" as the registered owner. *Id.* Defendant Robinson, riding in the passenger seat, told the officer Mr. Jarred was his employer and had permitted them to take the van on a two-week vacation. *See id.* A check with police dispatch revealed the van was not reported stolen. *See id.* After observing a homemade bed, two small gym bags, and a fishing pole in the back of the van, the officers decided to conduct a search, ultimately discovering marijuana hidden under the bed. *See id.* at 434. The trial court denied the defendants' motion to suppress the drug evidence. *See id.*

We stated:

> The defendants' testimony that they were given permission by the owner to take the van on a two-week vacation trip was not disputed by the State. We hold that they established a possessory interest in the van sufficient to give them both a legitimate expectation of privacy in the entire van interior.

Id. at 437 n.6.

In the instant case, Officer Mangelson was the only witness to testify at the hearing on defendant's motion to suppress. Officer Mangelson stated that when he inquired how defendant obtained possession of the car, defendant responded "the car belonged to a friend in California." According to Officer Mangelson, defendant said he and his passengers had been given permission from a friend to drive this car to Utah. Officer Mangelson initially noted the interior of the car was cluttered, as if defendant and his passengers had been living in the car.

Therefore, at the time of the search, the facts established (1) defendant was driving the car, (2) defendant had permission to use the car, and (3) defendant had personal belongings in the car.

Following the two-step standard outlined in *Taylor*, we first conclude defendant's statement that the car belonged to a friend in California who loaned it to defendant demonstrates a subjective expectation of privacy in the car. We must next conclude, as a matter of law, whether this statement manifests an expectation of privacy society is willing to recognize as legitimate. *See Taylor*, 818 P.2d at 565.

In the cases summarized above,[2] a driver who has permission to use a vehicle and has personal belongings in the car has a reasonable expectation of privacy in the car and its contents. In contrast to the defendant in *Constantino*, defendant in the present case told Officer Mangelson he was driving the car with the owner's permission. As in *Robinson*, defendant's statement that he borrowed the car he was driving with the owner's permission was sufficient to confer "a legitimate expectation of privacy in the entire [car] interior." *Robinson*, 797 P.2d at 437 n.6.[3]

Defendant's claim that he had permission to drive the Camaro was unrefuted, he had personal belongings within the car's interior, and Officer Mangelson had no information the car was stolen at the time of the search. Therefore, we are persuaded defendant demonstrated an expectation of privacy sufficient to permit him to challenge Officer Mangelson's warrantless search of the car.

SCOPE OF DETENTION

Defendant, for the first time on appeal, claims Officer Mangelson unreasonably detained him after the initial traffic stop when Officer Mangelson requested to search the car. The State responds that we should not consider this issue as defendant raises it for the first time on appeal.

A police officer may legally stop a vehicle incident to a traffic offense. *See Lopez*, 831 P.2d at 1043; *State v. Lovegren*, 829 P.2d 155, 157-58 (Utah App. 1992); *State v. Roth*, 827 P.2d 255, 257 (Utah App. 1992). Defendant does not challenge his initial stop, based upon an expired registration sticker. However, the length and scope of a police officer's detention of a vehicle for a traffic violation must be "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *State v. Johnson*, 805 P.2d 761, 763 (Utah 1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S. Ct. 1868, 1879 (1968)); *accord State v. Hansen*, 193 Utah Adv. Rep. 27, 28 (Utah App. 1992).

Utah courts have determined "[a]n officer conducting a routine traffic stop may request a driver's license and vehicle registration, conduct a computer check, and issue a citation." *Robinson*, 797 P.2d at 435; *accord Johnson*, 805 P.2d at 763. The officer may also check for outstanding warrants "so long as it does not significantly extend the period of detention." *State v. Figueroa-Solorio*, 830 P.2d 276, 280 (Utah App. 1992). However, once the occupants of the vehicle have satisfied the reasons for the initial stop, the officer must permit them to proceed. *See Lovegren*, 829 P.2d at 158. "Any further temporary detention for investigative questioning after the fulfillment of the purpose for the initial traffic stop is justified under the fourth amendment only if the detaining officer has a reasonable suspicion of serious criminal activity." *Robinson*, 797 P.2d at 435; *accord Hansen*, 193 Utah Adv. Rep. at 28.

The State correctly asserts that defendant

failed to complain about the scope of his detention during the suppression proceedings below. Although counsel for defendant renewed defendant's motion to suppress twice during trial, for some unexplained reason counsel never questioned the legality of defendant's detention until this appeal. Defendant is represented by the same counsel on appeal. Even on appeal, counsel's treatment of the issue is cursory at best.[4]

A defendant is ordinarily precluded from asserting a claim for the first time on appeal unless the trial court committed plain error. *See State v. Archambeau*, 820 P.2d 920, 922 (Utah App. 1991). The Utah Supreme Court has outlined the guidelines for determining "plain error" as follows:

> The first requirement for a finding of plain error is that the error be "plain," i.e., from our examination of the record, we must be able to say that it should have been obvious to a trial court that it was committing error. . . . The second and somewhat interrelated requirement for a finding of plain error is that the error affect the substantial rights of the accused, i.e., that the error be harmful.

Id. (quoting *State v. Eldredge*, 773 P.2d 29, 35 (Utah), *cert. denied*, 493 U.S. 814, 110 S. Ct. 62 (1989)); *accord State v. Ellifritz*, 835 P.2d 170, 174 (Utah App. 1992); *see also State v. Emmett*, 184 Utah Adv. Rep. 34, 35 (Utah 1992) (Appellate courts review claims of plain error "because, if the error is obvious, the trial court has the opportunity to address the error regardless of the fact that it was never brought to the court's attention.").

Therefore, in the present case, we must first determine whether the necessity of addressing Officer Mangelson's detention of defendant after the traffic stop "should have been obvious" to the trial court.

Neither the United States Supreme Court nor the Utah Supreme Court has focused precisely upon the issue of whether an officer's request for consent to search a vehicle after a routine traffic stop is beyond the scope of detention. However, two cases from the Utah Court of Appeals addressing this issue were decided only recently before October 3, 1990, the date of the hearing on defendant's motion to suppress, *Robinson*, 797 P.2d 431 (issued July 18, 1990) and *Marshall*, 791 P.2d 880 (issued April 18, 1990). Moreover, the certiorari petition in *Marshall* was still pending as of the date of the suppression hearing.

In *Robinson*, a police officer stopped a van for a traffic violation. *See Robinson*, 797 P.2d at 433. After receiving the driver's valid license and registration, learning the defendants had borrowed the van with their employer's permission to go fishing in Wyoming, determining the van had not been reported stolen, and issuing a citation, the officer further detained the defendants. *See id.* Based upon the officer's observation of a homemade bed, two gym bags, and a fishing pole in the van while speaking to the defendants, the officer requested and received permission to search the van. *See id.* at 433-34. The officer discovered marijuana during the search and arrested the defendants. *See id.* at 434.

On appeal, the defendants in *Robinson* claimed their continued detention after the officer had issued a citation constituted a seizure in violation of the Fourth Amendment. *See id.* at 435. We stated the proper inquiry was "'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified it in the first place.'" *Id.* (quoting *Terry*, 392 U.S. at 19-20, 88 S. Ct. at 1878-79). We noted the defendants' nervousness, failure to make eye contact with the officer, improper clothing and equipment for the weather, and failure to produce written permission from the owner were insufficient "to justify the roadside detention and questioning that followed." *Id.* at 436. We concluded the officer's detention of defendants and request to search after "the purposes for the initial stop had been accomplished" was "a violation of their fourth amendment rights." *Id.* at 437.

In *Marshall*, a police officer stopped the car the defendant was driving for an equipment malfunction. *See Marshall*, 791 P.2d at 881. In response to the officer's request, the defendant produced a New York driver's license and a California rental contract for the automobile. *See id.* The defendant told the officer he was traveling to Denver to ski and would return the car to San Diego. *See id.* at 881-82. The officer became suspicious of the defendant's travel plans, however, when he noted that the rental agreement specified the car would be returned in New York in five days. *See id.* at 882. After issuing the defendant a citation for the equipment problem and returning the license and rental contract, the officer asked the defendant if he had any alcohol, drugs, or firearms. *See id.* When the defendant said he did not, the officer asked to "'look inside the vehicle.'" *Id.* The defendant replied, "'Go ahead.'" *Id.* A search of the trunk revealed a controlled substance. *See id.*

On appeal, we applied the same standard set forth in *Robinson*. *See id.* at 884. We also noted there is no "bright-line rule as to the acceptable length of a detention because 'common sense and ordinary human experience must govern over rigid criteria.'" *Id.* (quoting *United States v. Sharpe*, 470 U.S. 675, 685, 105 S. Ct. 1568, 1575 (1985)). When reviewing the scope of detention, the focus should not be on the length alone but on "'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.'" *Id.* (quoting *Sharpe*, 470 U.S. at 686, 105 S. Ct. at 1575).

The police officer in *Marshall* examined the defendant's driver's license and rental contract and issued a warning citation for a defective turn signal within ten minutes of stopping the

defendant. *See id.* However, the officer's further detention of the defendant and request to search were appropriate because the defendant's destination itinerary would have made a reasonable officer suspect the defendant was involved in illegal activity. *See id.* Therefore, we admitted that, "[a]lthough it is a close call," the officer's questioning and detention of the defendant "was justified because he had reasonable suspicion to believe [the defendant] was engaged in a more serious crime." *Id.*

Significantly, all other pertinent opinions holding that a request to search a car following a traffic stop exceeded the scope of detention have been filed subsequent to the October 3, 1990 hearing on defendant's motion to suppress. In *Lovegren*, 829 P.2d 155, a police officer pulled the defendants' vehicle over for traffic violations. *See id.* at 156. The officer noticed the defendants were wearing sunglasses, and the vehicle was cluttered. *See id.* The officer subsequently requested and received permission to search the automobile, ultimately discovering a controlled substance. *See id.* at 156-57.

On appeal, the defendants questioned the legality of their continued detention "after the purpose of the initial traffic stop had been fulfilled." *Id.* at 157. We dismissed Lovegren's nervous behavior, the cluttered appearance of the car, and the defendants' bloodshot eyes as not indicative of criminal activity. *See id.* at 158. We concluded that, because the officer, "[w]ithout any other indication of criminal activity . . . simply made the decision to search the car," the officer's "detention of Defendants exceeded the scope of the traffic stop." *Id.* at 158 and 159.

In *State v. Godina-Luna*, 826 P.2d 652 (Utah App. 1992), a police officer stopped the defendants' car because he suspected the driver was intoxicated. *See id.* at 653. After speaking with the defendants, the officer was convinced both were sober; however, the driver began to shake when asked for his license and registration. *See id.* The driver had no license but gave the officer a California identification card and the vehicle registration. *See id.* at 654. The officer was allowed to search the car, and he discovered cocaine in the trunk. *See id.*

On appeal, the State claimed the officer had a "reasonable suspicion to further detain and question" the defendants. *Id.* We reasoned that nervousness and driving "in a less than direct route" to a stated destination do not support "a reasonable suspicion of criminal activity." *Id.* at 655. We concluded the officer's "detention and questioning of defendants exceeded the scope of the stop and was therefore illegal." *Id.*; *see also State v. Castner*, 825 P.2d 699, 703 (Utah App. 1992) (after defendant produced proper documentation and officer observed vehicle identification numbers on car registration and dashboard were consistent, officer's request to view vehicle number on car doorpost exceeded scope of traffic stop).

In the instant case, Officer Mangelson made a valid stop of the car defendant was driving because he observed the car's expired registration sticker. Officer Mangelson approached the car and requested defendant's driver's license and vehicle registration. Defendant had no registration and produced an invalid, temporary California driving permit. At this point, Officer Mangelson did not return to his patrol car to conduct a computer check, and the hearing transcript reveals no reference to his issuing any traffic citation to defendant. Instead, he appears to have commenced a dialogue with others in the car. In response to Officer Mangelson's inquiry, defendant's passengers said they were defendant's friends but could not give a reason why they were coming to Utah. Further extending the scope of detention, because he observed defendant's nervousness and the cluttered appearance of the car, Officer Mangelson asked defendant if he was carrying contraband. When defendant said he was not, Officer Mangelson requested and received permission to search the car for guns, alcohol, or drugs, ultimately finding cocaine.

Although neither the United States Supreme Court nor the Utah Supreme Court has specifically addressed this scope of detention issue, our recent opinions reveal a well-developed line of authority.[5] Under *Robinson* and *Marshall*, Officer Mangelson's detention of defendant and request to search may well have been beyond the scope of the original traffic stop. However, these opinions had only recently been decided and certiorari was still pending in *Marshall*. Because the controlling case law was still in its infancy at the time of the suppression proceedings below, we cannot say any error should have been obvious to the trial judge. We, therefore, decline to consider the scope of detention issue for the first time on appeal.

CONSENT TO SEARCH

A search conducted without a warrant is a per se violation of the Fourth Amendment unless the State establishes the existence of at least one of "'a few specifically established and well-delineated exceptions.'" *State v. Arroyo*, 796 P.2d 684, 687 (Utah 1990) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). One such exception is consent. *See State v. Vigil*, 815 P.2d 1296, 1301 (Utah App. 1991); *State v. Carter*, 812 P.2d 460, 467 (Utah App. 1991).

On appeal, defendant contends he did not voluntarily consent to Officer Mangelson's search of the vehicle. Specifically, defendant argues that because he does not speak English fluently and was intimidated by the officer, he did not voluntarily consent to the search. Defendant also argues his consent was tainted by the prior illegal detention.

To determine whether a defendant's consent to search was lawfully obtained, we apply a two-part test: "'(1) the consent must be

voluntary in fact; and (2) the consent must not be obtained by police exploitation of the prior illegality.'" *Carter*, 812 P.2d at 467 (quoting *Robinson*, 797 P.2d at 437); *accord Arroyo*, 796 P.2d at 688; *Godina-Luna*, 826 P.2d at 655.

Whether defendant's consent was voluntary in fact "is a fact sensitive issue to be determined by examining the totality of the circumstances," including "the specific characteristics of the accused and the details of the police conduct." *Carter*, 812 P.2d at 467; *accord Arroyo*, 796 P.2d at 689; *Castner*, 825 P.2d at 704. In addition, factors indicating a lack of coercion in obtaining a defendant's consent are the officer's lack "of a claim of authority to search," "the absence of an exhibition of force" by the officer, the officer's "mere request to search," "cooperation" by the defendant, and the officer's lack of "deception." *Carter*, 812 P.2d at 467-68 (quoting *State v. Whittenback*, 621 P.2d 103, 106 (Utah 1980)).

The second prong of the test applies only when "antecedent police illegality exists." *Carter*, 812 P.2d at 469. We need not consider this "attenuation" issue as we have previously declined to consider defendant's challenge to the scope of his detention for the first time on appeal. Our examination, therefore, focuses upon whether defendant's consent was "voluntary in fact."

In the present case, Officer Mangelson was the only witness at the hearing on defendant's motion to suppress. He stated that defendant "spoke mostly English" and "spoke fairly good English." If defendant could not understand, the woman passenger would interpret for him, "which was very seldom." Officer Mangelson testified that when he asked defendant for permission to search the car for guns, alcohol, or drugs, defendant replied, "Go ahead." Furthermore, although defendant apparently had no key to the trunk, when Officer Mangelson asked defendant to open the trunk, defendant "actually broke the lock on the trunk to open it." According to the officer, defendant "was that intent on showing me that there was nothing there."

In its written decision denying defendant's motion to suppress, the trial court found that "uncontr[o]verted testimony shows that consent was given for the vehicle search and no evidence would support a showing of the consent being coerced or in any manner otherwise unlawfully obtained."

Based on the record, we are not persuaded the trial court erred in determining defendant voluntarily consented to a search of the vehicle.

CONCLUSION

In sum, we initially find defendant has standing to challenge Officer Mangelson's warrantless search of the car. We conclude Officer Mangelson lawfully stopped defendant incident to a traffic violation and conducted a search of the vehicle defendant was driving pursuant to defendant's voluntary consent. We do not reach defendant's challenge to the legality of the scope of his detention as he raises this for the first time on appeal. Therefore, we affirm the trial court's denial of defendant's motion to suppress.

Judith M. Billings, Associate Presiding Judge

WE CONCUR:

Pamela T. Greenwood, Judge

Gregory K. Orme, Judge

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1. In its decision denying defendant's motion to suppress, the trial court stated:

> The two paramount[] considerations that this set of facts give[s] rise to are whether or not there was probable cause for the stop of the vehicle, and a subsequent search of it. *There is also an issue [as] to whether or not the defendant under the circumstances of this case had any standing to object to the officer searching the vehicle* aside from the probable cause question, and lastly whether or not a consent was obtained to search the vehicle by the trooper from the defendant.
>
> The Court concludes that the facts in this case support the right of the trooper to proceed with a search of the vehicle under *all of the above issues*.

(Emphasis added.)

2. We also agree with Judge Greenwood's reasoning in *DeAlo*, 748 P.2d 194. Judge Greenwood found the defendant had standing to object to an automobile search because the defendant was driving the car, possessed keys to the car's ignition and trunk, had personal belongings inside the car and trunk, "had complete dominion and control over the area searched and could exclude all others," and the officer understood the defendant had permission to use the car. *Id.* at 200-01 (Greenwood, J., concurring and dissenting).

3. The present case is easily distinguished from cases in which the defendants lacked standing because the police officers knew, before conducting a search, that the vehicles were stolen. *See State v. Purcell*, 586 P.2d 441, 442 (Utah 1978); *State v. Montayne*, 18 Utah 2d 38, 414 P.2d 958, 959-60, *cert denied*, 385 U.S. 939, 87 S. Ct. 305 (1966); *see also State v. Larocco*, 742 P.2d at 92 (court distinguishes between cases where search upheld because "it was clearly established and not disputed prior to the search that defendant did not own or did not have an interest in the property searched" and "those where defendant asserts ownership of the property or otherwise an interest giving rise to a 'legitimate expectation of privacy'").

4. Despite raising the scope of Officer Mangelson's detention of defendant for the first time on appeal, counsel for defendant failed to set forth or urge us to apply a plain error analysis. Furthermore, counsel never even cited extensive controlling authority that the appropriate scope of an officer's detention during a traffic stop is limited to checking a driver's license and vehicle registration, conducting a computer check for outstanding warrants, and issuing a citation. *See, e.g., Johnson*, 805 P.2d at 763; *Hansen*, 193 Utah Adv. Rep. at 28; *Lopez*, 831 P.2d at 1043; *Figueroa-Solorio*, 830 P.2d at 280; *Lovegren*, 829 P.2d at 157-58, *Roth*, 827 P.2d at 257; *Robinson*, 797 P.2d at 435. Finally, counsel for defendant failed to perceive that, because he should have raised the scope of

detention issue before the trial court, defendant on appeal had a potential claim of ineffective assistance of trial counsel Rather, counsel improperly represented defendant again on appeal *See Dunn v. Cook*, 791 P.2d 873, 878 (Utah 1990), *Fernandez v. Cook*, 783 P 2d 547, 550 (Utah 1989) (petitions for writ of habeas corpus were meritorious in view of fact that attorney who represents defendant at trial and on appeal cannot adequately challenge attorney's own competence in a claim of ineffective assistance of counsel).

5. *See also United States v. Guzman*, 864 F.2d 1512, 1519-20 (10th Cir. 1988) (officer's detention and search of automobile after examining driver's license, confirming car not stolen, and issuing citation exceeded scope of original traffic stop for failure to wear seat belt).